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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 146

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

Versus

EDNA K. YATES,

Response and brief in opposition to petition for Writ of Certiorari

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EDGAR WATKINS,
Attorney for Respondent.

Address,
1025 Citizens & Southern
National Bank Building,
Atlanta, Georgia.

Curtiss Printing Company, Inc., Atlanta, Ga.

SUBJECT INDEX

Subject	*Page*
The Petition	1
Summary of Additional Facts	2
Detailed Reference to the Record in Support of the Foregoing Summary	3
Brief in Reply to Brief of Petitioner	6

INDEX OF CASES

Cases:	*Page*
Banholzer v. New York Life Insurance Co., 178 U. S. 402 (408)	10
Commercial Bank v. Buckingham, 5 How. 317	10
Johnson v. New York Life Insurance Co., 187 U. S. 491 (496)	10
Western L. Indemnity Co. v. Rupp, 235 U. S. 261 (275)	9

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Respondent, Edna K. Yates, answering the petition for certiorari and the brief in support thereof, respectfully shows:

1

THE PETITION

The summary statement of the matter involved, we submit, is not sufficiently full. At page 2 thereof there is a statement that symptoms of the disease of carcinoma appeared in March 1932. No record reference in support of that statement or any other statement in the petition, is given and we submit that the proof does not support the statement.

In the petition, page 4, it is said that a false statement was made by the applicant for the insurance to the effect "that he had never had or been treated for cancer or tumor and indigestion." We shall set up the facts which we contend disprove this statement, or at least show that it was an issue of fact as to which there was a conflict of evidence.

SUMMARY OF ADDITIONAL FACTS

Yates, the insured, applied for insurance May 2nd, 1932. In his application he was asked to state as far as he knew the condition of his health. This he did and the facts show that he correctly answered the question. He was then asked to state whether or not he had "been treated" for certain named diseases. Among these is cancer or tumor. To this he answered "No," and the evidence does not show that this is an incorrect answer. Indeed the testimony indicates that it was correct. Certainly a jury had the right to find that the answer was truthfully made.

He was also asked if he had had indigestion, which he answered by telling the agent of the insurance company that he had been treated for indigestion and had been given milk of magnesia. Indigestion is a neutral and ambiguous term. In one sense it may mean a mere temporary functional disturbance. In another sense it may mean a serious disease. It is stated to be synonymous with dyspepsia and to be chronic. Certainly there was nothing chronic about the condition of the insured, he stated the facts truly, and the agent interpreted the statement to mean only the temporary functional disturbance, and therefore not truly indigestion, so a jury could well find that this was a true answer.

The insured was also asked if he had had medical advice for any other than the diseases named. He answered "no" and there is no proof or indication of proof that this answer was not true. The evidence conclusively shows that the physician who was consulted about indigestion and who treated it as unimportant, gave only one dose of milk of magnesia, did not regard the matter as material, nor as constituting indigestion in the sense it probably was meant in the application.

The witness continued to work and was apparently in good health. He was cheerful and there was nothing to indicate any disease.

Under these facts, we submit that his answers were all true and that certainly a jury under the evidence could have found that they were true.

DETAILED REFERENCE TO THE RECORD IN SUPPORT OF THE FOREGOING SUMMARY

Petitioner, defendant below, pleaded that there was "material misrepresentation and concealment of facts." (R. 12.) A similar allegation is made on the next page.

Question No. 26 as to the good health of the insured, the deceased, was limited by the words "so far as you know." (R. 17.)

The application for the policy gave the opportunity to the Company to correct errors or omissions. (Paragraph D, R. 19.)

Dr. Davidson, who treated the insured prior to his taking out the policy sued on here, gave milk of magnesia, one dose, so far as the records show. (R. 43.)

Even after the policy was taken out, and when the insured went to the hospital, the doctors "didn't know what was the matter with him." (R. 44, 45.)

The insured after taking the milk of magnesia never complained of any illness until after the policy was written. (R. 45.)

The insured told the agent of the petitioner, defendant below, that he had had medical advice for indigestion, and the agent then said "That is all right." (R. 45.)

When in April, 1932, the insured visited Dr. Davidson, the doctor was unable to make a diagnosis. (R. 48.)

Secondary anemia might exist without any cancerous tumor. (R. 50.)

Dr. Schmidt, who operated on the insured knew him but twenty days before June 23rd, 1932. The operation was had June 23, 1932. He died from carcinoma. While the doctor says that the disease commenced in March 1932, that is not sufficient to show the fact, when the doctor did not know him until twenty days before June 23rd, 1932. (Defendant's Exhibit No. 3.)

Dr. Davidson, who on April 7th, 1932, treated the deceased, says it was secondary anemia, and that he was unable to state when the health of the deceased was first impaired. (Defendant's Exhibit No. 4.)

The quotation from Section 58 of the Insurance Law of New York makes erroneous statements representations and not warranties, "in the absence of fraud." (R. 53.)

The Court of Appeals of New York, in the Minsker case said that even where representations are erroneous, they "will not vitiate the policy unless material to the risk." (R. 53.)

In the same case (R. 54) the Court makes reference to "incorrectly recording" answers. Here the Doctor construed the answer and thought he was correctly recording it.

In Travelers Insurance Company case, also put in evidence (R. 55), false statements were held to make out a prima facie case and it was shown that where no effort was made to explain this prima facie case and there was no denial of the allegation, recovery was prohibited. (R. 55, 56.)

In addition to the statutes, the testimony of an expert witness was offered as to the law of the State of New York. This witness said:

> "The decisions generally hold that the insurer is entitled to the best answer the insured is capable of making in response to such questions, that is, that it must be a full disclosure in good faith."

The witness further said the question was for the trial court to determine, and was a question of fact, and concluded by saying:

> "A jury are ultimately the finders of the fact whether or not the admissions in the proof of death have been explained away." (R. 101.)

A witness for the petitioner here, defendant below, testified that secondary anemia might result from causes other than cancer and that a person might have cancer and never know it. He also said:

> "If a man was working regularly every day and his appearance was of good health, and he had perfect digestion and made no complaints, and didn't appear from his looks to be a sick man, I would say that he didn't have a cancer, or any disease in its last stages." (R. 102-103.)

A witness for the plaintiff below, respondent here, who knew the insured intimately, testified that the insured ate regularly, was in good spirits, and that there was nothing to indicate that he was suffering from any disease at all. R. 104.)

Another witness for the plaintiff below, respondent here, testified that the deceased, the insured, was at work up to May 28th, 1932, at which time he entered the New York Hospital. (R. 104.)

BRIEF IN REPLY TO BRIEF OF PETITIONER

Petitioner here relies upon the claim that the Georgia Courts have decided a Federal question not in accord with applicable decisions of this Court. (Petition, 7.) It is submitted that this claimed reason is not supported by the record. Unless this is a specification of error, there is none in the petition or brief. (See Rule 27, par. E.)

It will be noted that the charge of the trial Court is not included in the record. Some extracts therefrom appear in the motion for new trial, but the charge itself does not appear.

The intermediate Appellate Court in Georgia holding that procedure and remedy were controlled by the law of the forum (R. 57) held that estoppel was proved in the case, referred to the "facts of this case," recited that the physician was unable to determine the insured's condition, that the insured worked every day and seemed to be in good health and spirits. That Court also defined what is meant by "sound or good health," said that under the facts of the case the physician could not determine whether or not a deadly malady existed, that the opportunity of both parties to the contract was equal, and concluded this argument by saying:

> "The question was properly one for submission to the jury under proper instructions from the Court, and that was done in this case."

The Court of Appeals then said the jury was authorized to find as it did, and the burden was on the insurance company to show the representations made were material. (R. 58, following.) The Court concluded its opinion by saying:

> "The evidence upon the controlling issues was conflicting."

This opinion was affirmed by the Supreme Court of Georgia. (R. 74.)

The undisputed facts showed that when the insured applied for his insurance he was asked if he had had cancer or indigestion. The evidence is clear that there was nothing to indicate to him or to the doctor at that time that he had cancer. As to the question about indigestion, he properly answered that he had had indigestion and had been given by his physician some milk of magnesia therefor. The agent of the insurance company, taking this application, construed this answer as being immaterial, construed indigestion as not being indicated by the answer, and told the applicant that that was all right, and did not write down the statement as to indigestion.

Petitioner relies largely on its Exhibit No. 3, following page 52 of the Record. This Exhibit shows that the hospital physician had known the deceased only twenty days before operating, first meeting him on June 3rd, 1932. It is true that this physician said that the disease from which the insured died commenced in March 1932, but the Exhibit itself shows the physician could not have known whether or not that answer was true, and some of the questions shown on the Exhibit were not answered by the physician. The jury certainly had the right to believe the physician's statement was untrue.

The physician who treated the insured (Exhibit No. 4) was unable to state when the insured's health was first impaired.

The New York Law relied upon here (R. 53) makes the statements representations, and not warranties, "in the absence of fraud." Were not the Courts in Georgia right when they held that the facts justified submitting to the jury the question of estoppel, which is based upon fraud?

The insurance company through its agent, decided that the answers given to the questions on which the policy was based were truthful or immaterial. The insured did not know that the answers were not truthful and did not know

that the answers were not correctly given. Would it not be a fraud on the part of the insurance company for its agent to decide the question of materiality and correctness of the answer, and thereafter claim that its decision was wrong and seek to void its contract because of its own wrong decision?

The applicant for insurance was asked as to his good health only so far as he knew (Q. 26, R. 17.) The insured did say, according to the written application, that he had never had indigestion. The agent for the insurance company agreed with him that he was correct and agreed with a knowledge of the facts. He did answer in his application that he had not had cancer or tumor. No one can say that this answer was not true at the time. Certainly the jury had a right to believe that it was true. He did answer that he had not had medical treatment for other disease for five years. This was a true answer.

Petitioner here, defendant below, reserved the right after discovering errors or omissions, to have them corrected. (Paragraph D, R. 19.) The insurance company was informed of the facts and if this information was erroneous or contained omissions, there was a provision in the contract for correcting them. The petitioner having failed to make such correction, having induced the answers, now claimed to be false, it would be a fraud within the meaning of Section 58 of the Insurance Laws of New York to permit a cancellation of the contract here sued on.

In the Minsker decision, it was held (R. 53) that representations "though erroneous, will not vitiate the policy unless material to the risk."

In this case it will be noted further that there are references about incorrect record of applicant's answers. Here the applicant gave a correct answer. The Medical Examiner, knowing more about the situation than the applicant could know, construed the statements made to him as justifying

the answer "No" concerning indigestion. Is there not ample support for this construction by the Medical Examiner? Were not the Georgia Courts authorized to approve that construction and could not a jury find that the construction placed upon the answer of the insured was correct? It will be recalled that the charge to the jury is not in the record except as to some excerpts therefrom copied in the motion for new trial, and the presumption is that the charge adequately submitted the issues to the jury.

In the Travelers Insurance case (R. 55) false statements make only a prima facie case and may be explained.

The Court also in this case said:

> "He neither denied nor *explained* the untrue statement in his application, and *he gave no information concerning the state of his health at the time of his medical attention or on the dates of his application*, or of his payment of the first premium." (R. 55.)

Here there was a complete and we submit a satisfactory explanation, at least the jury so found, of the statement made in answer to the question of the Medical Examiner. The Medical Examiner construed the actual statement made as meaning the same as he set out in filling out the application. Full information concerning the health of the insured was given, so far as he knew. No one questions this.

Under these circumstances, it is submitted that no Federal question arises here. In *Western L. Indemnity Co. v. Rupp*, 235 U. S. 261 (275), this Court announced the rule universally applied, and supported the rule by the citation of many cases. The rule so announced reads:

> "It is earnestly argued that the court erred in its construction of the Illinois statute. We do not pass upon this question, deeming it to be outside of the limits of our jurisdiction; for it is settled that where, in a state court, the validity of an act of the legislature

of another state is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the 'full faith and credit' clause of the Federal Constitution."

In another case, *Banholzer v. New York Life Insurance Co.*, 178 U. S. 402 (408), the question of the right of Courts of one State to construe the conclusions of the Courts of another arose, and this Court said:

"The plaintiff in error, however, assails the conclusions of the court. It asserts the court erred in its construction of the Conway case, and erred in its independent construction of the New York statute.

Granting, arguendo, the correctness of both assertions, the validity of the statute was not denied. Its validity and authority were declared and its meaning was first sought in a decision of the New York courts and then confirmed by an independent care and construction."

In *Johnson v. New York Life Insurance Company*, 187 U. S. 491 (496), this Court said:

"Whether the Supreme Court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was immaterial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of *Banholzer v. New York L. Ins. Co.*, 178 U. S. 402. * * * * * * * * * * * * To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment.

The validity of the New York statute was not called in question. The case turned upon its construction. This was not a Federal question. *Commercial Bank v. Buckingham*, 5 How. 317."

We do not stop to analyze the several cases relied upon by petitioner in his brief herein. None of such cases conflict

with the rulings quoted above from the decisions of this Court.

It is respectfully submitted that no Federal question is involved in this application.

EDGAR WATKINS,
Attorney for Respondent.

Address,
1025 Citizens & Southern
National Bank Building,
Atlanta, Georgia.